

June 8, 2005

Richard D. Pio Roda  
Assistant City Attorney  
City of Milpitas  
Meyers Nave Riback Silver & Wilson  
555 12<sup>th</sup> Street, Suite 1500  
Oakland, CA 94607

**Re: Your Request for Advice**  
**Our File No. A-05-091**

Dear Mr. Pio Roda:

This letter is in response to your request for advice on behalf of Mayor Jose Esteves and Milpitas City Councilmember Debra Giordano regarding the conflicts-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> It should be noted that the Fair Political Practices Commission (“Commission”) does not act as a finder of fact when providing assistance; this assistance is based solely on the facts you provide. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### **QUESTION**

Does Councilmember Giordano or Mayor Esteves have a conflict-of-interest participating in the review and potential approval of a proposed ordinance regulating all manner and type of signs, including residential real estate signs, within the City?

### **CONCLUSION**

No. It is not reasonably foreseeable that this decision will have a material financial effect on their economic interests.

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

## FACTS

The City of Milpitas ("City") is currently considering updating its sign code ordinance. The stated purpose of the proposed ordinance is to regulate all signs which are publicly displayed in the City. It is recommended that the safety of pedestrians and vehicles, protection against fire, and the enhancement of the outward appearance of the community are important factors in the general welfare of the people, and that reasonable control of such signs is in the public interest.

The proposed ordinance would regulate all manner and types of signs within the city, from garage sale signs to balloon signs to construction signs. Signs used by businesses to advertise their location, operations and activities, whether in the public right-of-way, a shopping center or other town square, would be regulated through time, place, design and manner restrictions.

Signs to be regulated would include signs used by real estate professionals to advertise properties. The proposed ordinance would require that, among other things, real estate advertising signs greater than six square feet in residential zones, would have to be approved by the City's Planning Commission. The proposed ordinance specifically regulates the types of signs that are typically used to advertise real estate "open house" events.

Councilmember Giordano is employed as a real estate agent with a real estate firm that lists residential properties within the City. More specifically, Ms. Giordano is a licensed broker and is a broker-associate for a small two-person realty business that specializes in the resale of residential dwellings both inside and outside of Milpitas. In a telephone conversation with Commission counsel on June 1, 2005, you indicated that Councilmember Giordano's investment in her real estate business is worth over \$2,000. You expressly indicate in your letter that Councilmember Giordano's business is a small business entity under regulation 18705.1(c)(4).

You also expressly indicated, in your June 1, 2005 phone conversation with Commission counsel, that Councilmember Giordano believes that it is not reasonably foreseeable that the proposed sign ordinance would affect her real estate business as described in regulation 18705.1(c)(4). In other words, you stated that she does not believe that the proposed sign ordinance would result in a \$20,000 or greater increase or decrease in either the value of her business or its fiscal year gross revenues. You also stated that Councilmember Giordano does not believe that the contemplated ordinance would result in her business incurring or avoiding additional expenses or reducing or eliminating existing expenses by \$5,000 or more in a fiscal year.

Neither in your correspondence, nor your June 1 telephone conversation with Commission counsel, did you identify the anticipated existence of a source of income for Councilmember Giordano, other than her real estate business, which would provide her with \$500 or more of income in the year preceding the anticipated decision on the

proposed sign ordinance. Finally, Ms. Giordano does not engage in the development or sale of new homes, nor does she anticipate doing so in the foreseeable future.

Mayor Esteves possesses a California real estate broker's license, having qualified and passed the requisite tests for obtaining a real estate broker's license. In your correspondence and June 1 conversation with Commission counsel, you indicated that the mayor does not, and has not for at least two years, received any income from any source through the sale or marketing of real estate. He is currently employed as a department information systems specialist II for the Santa Clara County Superior Court. Finally, you indicated that Mayor Esteves does not engage in the development or sale of real estate, nor does he anticipate doing so in the foreseeable future.

### **ANALYSIS**

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Reg. 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision which has a reasonably foreseeable material financial effect on one or more of his or her financial interests. (Section 87103.)

#### **Steps 1 & 2: Are Councilmember Giordano And Mayor Esteves Public Officials Making, Participating in Making, or Influencing a Governmental Decision?**

A "public official" means every member, officer, employee or consultant of a state or local government agency. (Section 82048; see also section 82003 [defining "agency"], § 82041 [defining "local government agency"], and § 82019 [defining "designated employee"].) A "member," for purposes of defining "public official" includes, but is not limited to, "salaried or unsalaried members of committees, boards or commissions with decision-making authority." (Reg. 18701(a)(1).)

Councilmember Giordano and Mayor Esteves are members of the city council for the City of Milpitas. The City is a local governmental agency. In those roles, both the council member and mayor make, participate in making and influence governmental decisions affecting the City. (See regulations 18702 – 18702.4 [defining making, participating in making, and influencing governmental decisions].) Consequently, both the council member and the mayor are public officials that make, participate in making, or influence governmental decisions.

#### **Step 3: Do Councilmember Giordano And Mayor Esteves Have Potentially Disqualifying Economic Interests?**

A public official has a financial interest in a decision within the meaning of section 87103 if it is reasonably foreseeable that the decision will have a material

financial effect, distinguishable from its effect on the public generally, on any of the following types of economic interests:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (section 87103(a); reg. 18703.1(a)), or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); reg. 18703.1(b));
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); reg. 18703.2; see section 82033 [defining “Interest in real property”]);
- An economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); reg. 18703.3);
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$360 or more within 12 months prior to the decision. (Section 87103(e); reg. 18703.4);
- An economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule. (Section 87103; reg. 18703.5.)

### ***Councilmember Giordano***

The real estate business in which the council member states she has an ownership interest of over \$2,000 constitutes an economic interest in a business entity in which she has a direct or indirect investment of \$2,000 or more. (Section 87103(a) & (d); reg. 18703.1(a) & (b).)

In addition, the council member has an economic interest in each of the customers of her real estate business from whom she has received income, including commission income and incentive compensation, aggregating \$500 or more within 12 months prior to the time any decisions will be made. (Section 87103(c); reg. 18703.3(a)(1).)

“Commission income,” as used in regulation 18703.3, “means gross payments received by a public official as a result of services rendered as a broker, agent, or other salesperson for a specific sale or similar transaction.” (Reg. 18703.3(c)(1).) Sources of commission income for a real estate broker or agent include the person the broker represents in a transaction, the person represented by an agent from whom the broker receives any commission, the brokerage business entity, and any person who receives a finder’s or other referral fee for referring a party to the transaction to the broker, or who makes a referral pursuant to a contract with the broker. (Reg. 18703.3(c)(2)(B) and (c)(2)(C).)

You have not identified particular customers of the council member's real estate business who qualify as sources of income under section 87103, by providing her with income aggregating \$500 or more within the 12-month period prior to the governmental decision at issue. We therefore do not include the council member's potential clients in our analysis, but point out that she must still determine whether any of her real estate clients qualify as sources of income and whether it is reasonably foreseeable that the proposed sign ordinance she participates in will result in a material financial effect on any of the identified clients.

***Mayor Esteves***

Though the mayor currently does not, believes that in the future he will not, and has not (for at least two years) derived income through the sale or marketing of any real estate, the fact that he is licensed as a real estate broker constitutes a potential business entity economic interest in the proposed sign ordinance decision.<sup>2</sup>

**Step 4: Are The Economic Interests Identified Above Directly or Indirectly Involved in The Proposed Governmental Decision?**

In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly involved or indirectly involved in the governmental decision. (Reg. 18704(a).)

A person – including business entities or sources of income – “is directly involved in a decision before an official's agency when that person, either directly or by an agent: [¶] (1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or; [¶] (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency.” (Reg. 18704.1(a)(1) & (a)(2).)

Information you have provided indicates that neither Councilmember Giordano's real estate business, nor Mayor Esteves's mere licensing as a non-practicing real estate broker, initiated or is the subject of the contemplated proceedings regarding a new sign ordinance before the city council. Therefore, the council member's and the mayor's economic interests are indirectly involved with the proposed governmental decision before the city council.

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<sup>2</sup> Though you indicate that the mayor is employed as a department information systems specialist II for the Santa Clara County Superior Court, this fact appears to have been presented as incidental to the proposed sign ordinance and only in an effort to highlight that the mayor does not earn income marketing real estate. We therefore do not analyze whether his superior court job would create a conflict-of-interest with any governmental decisions he may participate in regarding the proposed sign ordinance.

**Steps 5 & 6: Materiality Standards and “Reasonable Foreseeability”**

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official’s economic interests is material. (Reg. 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the governmental decision under consideration. (See Reg. 18706 [defining “reasonably foreseeable”].)

***Councilmember Giordano’s Real Estate Business***

According to regulation 18705.3, subdivision (b)(1), the materiality standards for indirectly involved sources of income which are business entities are set forth in regulation 18705.1, subdivision (c), and depend on the relative size of the business entity. Since you have expressly represented that Ms. Giordano’s real estate business is defined under regulation 18705.1(c)(4), we examine her interest according to the regulation. (See Reg. 18705.1(c)(4) [defining the materiality standard applied to smaller businesses].)

The financial effects of a governmental decision on an indirectly involved smaller business entity would not be considered material unless the decision under scrutiny impacted the business as described below:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.” (Reg. 18705.1(c)(4).)

You have expressly stated that it is not reasonably foreseeable that the proposed sign ordinance would affect her real estate business in any of the ways described in regulation 18705.1(c)(4), above. Therefore, assuming this is correct, Councilmember Giordano’s real estate business would not be materially affected by the proposed sign ordinance. Since there is no reasonably foreseeable material financial effect, there is no need to continue the analysis.<sup>3</sup>

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<sup>3</sup> It should also be noted that a reasonably foreseeable financial effect on a public official’s personal finances is deemed material if it amounts to at least \$250 in any 12-month period. (Reg. 18705.5.) This is commonly referred to as the materiality standard for “personal financial effects.” Based upon our lack of information, we do not know what effect the proposed sign ordinance might have upon the personal

***Mayor Esteves's Real Estate License***

Based upon the facts that you have provided, Mayor Esteves merely possesses a real estate license, but has not participated in the real estate business for two years, and does not plan to engage in any real estate business sales or marketing. "Possession of a real estate sales or brokerage license, or any other professional license, without regard to the official's business activity or likely business activity, does not in itself make a material financial effect on the official's economic interest reasonably foreseeable." (Reg. 18706(c).) Therefore, there would not be reasonably foreseeable material financial effect due to the proposed sign ordinance decision and the mayor may participate in the decision.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
General Counsel

By: Andreas C. Rockas  
Counsel, Legal Division

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assets, liabilities, expenses and revenue of the entities Councilmember Giordano and Mayor Esteves own. Therefore, we cannot provide you with a conflict analysis regarding personal financial effects.